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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

93-144 ORIGINAL

In the matter of	)	
	)	
Amendment of Part 90 of the	)	**PR Docket No. 93-144**
Commission's Rules to Facilitate	)	**RM 8117, RM 8030**
Future Development of SMR Systems	)	**RM 8029**
in the 800 MHz Frequency Band	)	
and		
Implementation of Section 309(j)	)	
of the Communications Act-	)	**PP Docket No. 93-253**
Competitive Bidding	)	
800 MHz	)	

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REPLY COMMENTS OF E.F. JOHNSON COMPANY

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SUMMARY

E.F. Johnson submits that the creation of a "new" wide area SMR service is necessary only if the FCC determines that contiguous spectrum is a critical element of achieving regulatory parity. E.F. Johnson believes that the Commission should license such wide area systems on a BEA basis. Local SMR systems should be licensed on a site-by-site basis.

If the Commission concludes the use of contiguous spectrum is necessary and adopts mandatory retuning for existing licensees, it must protect the incumbent licensees by affording them sufficient opportunities to continue providing comparable service. Finally, E.F. Johnson urges the Commission to make available sufficient spectrum for local SMR licensees and exempt them from CMRS treatment.

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To: The Commission

REPLY COMMENTS OF E.F. JOHNSON COMPANY

E.F. Johnson Company ("E.F. Johnson" or the "Company"), by its attorneys, pursuant to Section 1.415 of the Rules and Regulations of the Federal Communications Commission ("FCC" or "Commission") hereby submits its Reply Comments in response to the initial Comments of other parties which addressed the Further Notice of Proposed Rule Making ("Further Notice") adopted in the above referenced proceeding[1] designed to implement a new framework for licensing of Specialized Mobile Radio ("SMR") systems in the 800 MHz band.

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[1] Further Notice of Proposed Rule Making, P.R. Docket No. 93-144, FCC 94-271 (released November 4, 1994). The FCC twice extended the dates for the submission of Comments and Reply Comments in this proceeding. See, Order, P.R. Docket No. 93-144, DA 94-1326 (released November 28, 1994) and Order, P.R. Docket No. 93-144, DA 95-67 (released January 18, 1995).

I. INTRODUCTION

E.F. Johnson submitted comments in this proceeding on January 5, 1995. It pointed out that an auction of SMR spectrum to create wide area systems is unnecessary and not in the public interest in light of the maturity of the SMR industry. It suggested that other regulatory changes, less dramatic in nature, can achieve regulatory parity between wide area SMR and substantially similar mobile communications services. Nevertheless, if the FCC proceeds with the authorization of wide area SMR systems in the manner proposed, the Company did not object to the Commission's proposal to allocate 10 MHz of spectrum for Major Trading Area ("MTA") based licensing in 2.5 MHz blocks. E.F. Johnson's Comments supported the continued authorization of local SMR systems on a site by site basis.

The Company also supported the Commission's proposal not to require mandatory retuning of existing SMR licensees whose systems are located within the 200 channels proposed for MTA based licensing. It recommended that for a six month period, local licensees be afforded an opportunity to submit applications to modify their facilities prior to the time any MTA based or other wide area SMR applications are filed. Finally, the Company reiterated its position that there is no logical basis for subjecting local SMR systems to the same regulatory structure as cellular and personal communications services ("PCS").

Many other parties submitted comments in this proceeding. Several of those parties supported the positions taken by the Company. Moreover, the Company actively participated in discussions with other entities interested in the future regulation of the 800 MHz SMR industry, in an attempt to suggest to the Commission a methodology to permit the authorization of wide area SMR systems, while permitting the growth of vibrant local SMR systems. Accordingly, the Company is pleased to have this opportunity to respond to the initial comments of other parties,

and to reexamine its own initial Comments in support of those efforts to reach an industry consensus.

III. REPLY COMMENTS

A. The Need for Rule Changes to Permit the use of Wide Area SMR Systems

In its initial Comments, the Company pointed out that only limited rule changes are necessary to create wide area SMR systems. Such systems have been authorized by the Commission in the past on a waiver basis. The Company recognized that because the regulations did not originally envision the authorization of wide area systems, some modification of the rules might be appropriate to permit their authorization in a more streamlined fashion.

Those in favor of rule modification argue that while wide area systems may be authorized today, they may not be able to compete effectively with other forms of commercial mobile radio services ("CMRS"), because they will not have access to technologies that require the use of contiguous spectrum.[2] As E.F. Johnson noted in the past, wide area licensees cannot now complain that it is impossible, or even unattractive, to offer wide area service unless the Commission restructures the 800 MHz band to permit the use of contiguous spectrum. Today's wide area licensees entered the wide area SMR service, intending to compete with other forms of mobile telephony, knowing the rules governing the use of the SMR spectrum.

There are only two bases, therefore, for the Commission to modify its regulations to permit the authorization of a type of wide area SMR system different from that allowed today: 1) that regulatory parity must be achieved between wide area SMR providers and other forms of

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[2] See, Comments of Nextel Communications, Inc. ("Nextel") at pp.21-26.

CMRS[3]; and 2) that the use of contiguous spectrum is a critical element of achieving such regulatory parity.[4] Because not all elements of wide area regulatory structure can be made comparable to that of other CMRS services, the Commission must affirmatively determine that the aspect which involves the use of contiguous spectrum is important enough to merit the disruption that the FCC's plan will necessarily involve. As noted above, and as confirmed by the comments of others, the creation of a "new" wide area SMR service, different from the service developed heretofore under Commission rule waivers, is only necessary if the FCC determines that contiguous spectrum is necessary to create a service that exhibits regulatory parity with other forms of CMRS.

B. Channel Assignment and Service Areas

If the FCC determines that contiguous spectrum is a critical element of wide area SMR systems, and relicenses the spectrum accordingly, the Company nevertheless believes that the Commission should create as much opportunity as possible for entry by as many entities as practical. In its initial comments, the Company recommended the licensing of four 2.5 MHz blocks each on an MTA basis. The Company understands that the American Mobile Telecommunications Association ("AMTA") will offer a proposal that features licensing of wide area SMR systems along geographic boundaries defined by the United States Bureau of Economic Analysis (so called "BEA" areas). Two licenses, one of 120 channels, the other of 80

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[3] E.F. Johnson recognizes that this is a determination made by the Commission in the Third Report and Order in the Docket No. 93-252 proceeding. Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Third Report and Order, GN Docket No. 93-252, 9 FCC Rcd 7988 (1994).

[4] Plainly, the Commission cannot conform all elements of wide area SMR regulatory structure to that of other CMRS. For example, the Commission cannot guarantee that wide area SMR licensees will have access to a comparable amount of spectrum as other CMRS providers.

channels would be available throughout the BEA. While the Company continues to believe that more than two providers in each market will best serve consumers, it recognizes the benefit of licensing on a BEA basis.[5] Licensing on a BEA basis will accomplish much of what the Company thought desirable in supporting the licensing of 50 channel blocks. BEA licensing will promote more responsive service to the public, because each BEA licensee will cover a smaller customer base. Moreover, by employing BEA licensing, the Commission will not foreclose a local operator from offering service simply because co-channel spectrum has been obtained on an MTA basis.

In its Comments, the Company supported licensing of local SMR systems, using the "lower" 80 SMR channels and the 150 General Category channels, on a site-by-site basis. Other parties took a similar position.[6] E.F. Johnson continues to believe that the Commission should license local SMR providers in a manner that preserves the local nature of this service. Local licensing allows reuse of frequency assignments, permitting different operators to employ the same channels to serve different customers in different geographic areas. Local licensing on a BEA basis would foreclose that opportunity because many of the BEAs are large enough to support frequency reuse. Local licensing on a BEA basis would, therefore, make channels unavailable in one market simply because a local licensee secures an authorization covering an entire BEA.

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[5] E.F. Johnson participated in the industry discussions sponsored by AMTA. It believes that the AMTA proposal is superior to that offered by the Commission. While the Company is generally supportive of the AMTA plan, it takes the opportunity of these Reply Comments to highlight some areas where it continues to have divergent views.

[6] See, e.g., Comments of Ericsson Corporation; Comments of Genesee Business Radio Systems, Inc.; Comments of Russ Miller Rental.

Licensing existing systems using the lower 80 SMR and the General Category channels on a BEA basis will also be problematic, at best. Today, there are likely more than one licensee in a BEA. In any environment where retuning occurs, wide area licensees may also retune more than one local licensee to the same lower 80 or General Category channel within a BEA, even offering 70 mile co-channel protection. It is not evident that sound measures have been proposed for these circumstances. Accordingly, E.F. Johnson recommends that local licensees employing lower 80 or General Category channels, continue to be licensed on a site-by-site basis.[7] BEA wide licenses could be available prospectively to licensees using this spectrum if they demonstrate that: 1) no other licensee's service area provides coverage within the desired BEA; and 2) they will provide service to a Commission specified percentage of population or geography.

In the unlikely event that spectrum remains available on any lower 80 or General Category channel throughout an entire BEA after retuning, the Commission could accept new applications for local licensing on these channels on a BEA basis. However, under those circumstances, the new local BEA licensee would presumably be required to provide coverage throughout some percentage (whether population or geography) of the BEA. In order to avoid those requirements, the applicant should be able to specify whether it wishes to secure a BEA based, or a site specific license. If it secured a site specific license, the channel would otherwise remain available (as it is today, and as it will likely be throughout other BEAs) for licensing to co-channel users who observe a 70 mile co-channel separation.

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[7] To the extent that licenses could still be issued offering 70 mile co-channel protection, they should still be available.

C. Rights and Obligations of Wide Area SMR Licensees

As noted above, in order for the Commission to logically proceed with the adoption of the regulations proposed to effectuate wide area SMR licensing in a form other than that which exits today, it must find that: 1) regulatory parity must be achieved between wide area SMR providers and other mobile communications service providers; and 2) the use of contiguous spectrum is a critical element of achieving such regulatory parity. It is the second of these findings that purportedly militate in favor a plan of mandatory retuning for existing licensees.

In its initial Comments, the Company strongly supported the Commission's proposal not to require relocation of existing SMR licensees whose systems are located within the 200 channels designated for wide area based licensing. The Company continues to doubt whether the use of contiguous spectrum, which would require retuning of existing licensees, is an important element of achieving regulatory parity. If, however, the FCC reaches a contrary conclusion, and adopts required retuning, it must assure adequate protection for incumbent licensees.

If retuning is mandated for the benefit of wide area licensees, so that they may employ a technology based upon contiguous spectrum, no such retuning should occur until the licensee demonstrates that it has earnestly attempted to engage in voluntary retuning. The Company understands that AMTA will propose a plan of "progressive retuning" under which a wide area licensee would be entitled to initiate a mandatory retuning process if it demonstrates that a specified percentage of channels are already available to it (through purchase, voluntary retuning or other means). The percentage of channels that the wide area licensee would be required to demonstrate control over in order to initiate mandatory retuning would decline over time. Accordingly, those wide area licensees who successfully employed voluntary retuning and other

methods to secure the use of a high percentage of channels in an area, would be rewarded with an opportunity to require retuning of the remaining licensees. Conversely, wide area licensees that did not vigorously pursue measures to ensure their exclusive use of channels in a geographic area would not have the opportunity to require retuning of remaining licensees.

If the Commission finds that wide area SMR licensees must be authorized to use contiguous spectrum, the Company agrees with the philosophy behind the progressive retuning approach. A wide area licensee need not be foreclosed from using contiguous spectrum by a single licensee or a small group of licensees that control a small percentage of the otherwise contiguous spectrum. However, in the absence of a licensee's demonstrated successful effort to engage in voluntary retuning, the Commission should not mandate retuning for incumbent licensees.

More importantly, the Commission must ensure that "retuned" licensees are accorded every opportunity to continue to provide the service they now offer. While the Commission may legitimately pursue the goal of providing additional broadband CMRS services, it should preserve the service offered by local SMR providers. Accordingly, the Company recommends that, unless specifically waived by the existing licensee, all existing licensees willing to engage in voluntary retuning receive the <u>at least</u> the following[8]:

- Spectrum provided by the wide area licensee on which to relocate their facilities. The spectrum must be usable at the same location as the licensee's existing facilities, with a minimum of the same level of co-channel interference protection.

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[8] The Company expects that more attractive or creative arrangements may be available on a mutually agreeable basis. The following list states requirements by which the wide area licensee would be required to abide if the local SMR operator requested retuning.

- Full cost compensation from the wide area licensee, including all ancillary costs associated with retuning the equipment of licensees' subscribers. Such ancillary costs could include, for example, cost of mailings to subscribers to inform them of the need for retuning.[9]

- Tax certificates, if available.

- By modification of the Commission's rules, no retuned licensees should receive co-channel protection less than 70 miles on a prospective basis.

All of these benefits should be available on a fully transferable basis. Local SMR licensees, in order to achieve certainty in their own operations, should be able to require voluntary retuning on this basis within a reasonable time from the issuance of the wide area authorization. Wide area licensees who are unable to provide voluntary retuning on the bases specified by the Commission should thereafter be foreclosed from seeking to retune any licensee who earlier requested voluntary retuning. In addition, incumbent licensees who are not retuned upon request should receive a minimum of 70 mile co-channel protection from any use of their channel by the wide area licensee.[10]

Should the Commission require mandatory retuning for "holdout" licensees, upon a demonstration by the wide area provider that it has engaged in otherwise successful voluntary retuning, the "holdout" licensee should receive as many of the same benefits as possible as those that engaged in voluntary retuning. "Holdout" licensees also provide service to subscribers who should not be harmed by the service provider's inability to come to terms with the wide area licensee. Nevertheless, the Company recognizes that those licensees engaging in voluntary

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[9] To the extent that there is a dispute between the local licensee and the wide area SMR provider as to the recoverable costs, the Commission could employ its alternative dispute resolution ("ADR") procedures.

[10] The Company recognizes that co-channel usage by existing non-wide area systems would be unaffected.

retuning should be afforded beneficial treatment in comparison with licensees subject to mandatory retuning. Those benefits would be:

- The ability to avoid retuning in the event that the wide area licensee is unable to engage in the minimum acceptable level of retuning.
- Any benefits available from the Commission, such as tax certificates.
- The clearest possible channels.[11]

Accordingly, licensees subject to mandatory retuning would still receive full cost compensation, and relocation to the clearest spectrum available. In the event that there are disputes involved in the mandatory retuning process, the Commission's ADR processes could be employed.

The Company's Comments noted that existing licensees are often "surrounded" by current wide area licensees, precluding any movement of transmitter facilities. Moreover, the FCC has suspended acceptance of applications for modification of SMR authorizations. As stated above, wide area licensees should be required to retune existing local operators to channels on which they would have the same protection as they do today. However, that condition is meaningless if the Commission effectively precludes existing local licensees from moving prior to the time that any voluntary retuning process occurs. In order to permit voluntarily retuned licensees to provide service from the site they believe most beneficial, the Commission should permit existing licensees to modify their facilities prior to the time that the FCC awards wide area licenses. Because some licensees cannot move, because they are surrounded by unbuilt wide area stations today, the Commission should require that any voluntary retuning occur so that the

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[11] The Company recommends that wide area licensees be required to provide licensees engaged in voluntary retuning with the "clearest" channel available at the time the request for retuning is received, or the agreement between the parties is reached.

incumbent licensee may employ its retuned channels at: 1) the existing authorized site; 2) ten miles from the authorized site; or 3) to any site which, based upon an appropriate engineering statement, does not extend the incumbent licensee's coverage area.

D. SMRs on General Category Channels and Inter-Category Sharing

The Company's Comments urged that the Commission continue to make available sufficient spectrum for local SMR systems, and that such systems be licensed on a site specific basis. Many other parties agreed with the Company's contentions.[12] Whether local licensees are authorized on a site specific or geographic basis, it is critical that they retain access to sufficient channels to ensure the future growth of these important system. E.F. Johnson agrees with Motorola, that local licensees retain unconditional access to: 1) the "lower 80" SMR channels; 2) the 150 General Category Channels; and 3) intercategory shared access to the Business and Industrial/Land Transportation "Pool" channels.[13]

E. Regulatory Classification of Licensees

The Company's initial Comments, pursuant to the Commission's inquiry, argued against CMRS treatment for local SMR licensees. Other parties stated that wide area SMR operators be subject to the same regulatory treatment as other broadband CMRS providers.[14] However, there was no broad support for similar treatment of local SMR systems. Accordingly, the Commission should, as the Company has argued in the past, and as confirmed in this proceeding, exempt local SMR systems from CMRS treatment.

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12 See, supra, fn. 6.

13 Comments of Motorola at p. 17.

14 Comments of McCaw Cellular Communications, Inc. at pp. 2-6.

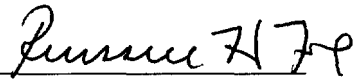
III. CONCLUSIONS

Should the Commission affirmatively determine that the use of contiguous spectrum is necessary to achieve regulatory parity, it should create wide area SMR systems licensed on a BEA basis. Local SMR systems, using channels from the lower 80 SMR spectrum and the General Category channels should be licensed on a site-by-site basis to preserve the local nature of the service. Should the Commission determine that mandatory retuning of incumbent licensees is necessary, it must provide adequate protection for those licensees. Finally, the Commission should ensure that sufficient spectrum will be available to local SMR licensees and exempt them from CMRS treatment.

WHEREFORE, THE PREMISES CONSIDERED, the E.F. Johnson Company hereby submits the foregoing Comments and urges the Commission to proceed in a manner consistent with the views expressed herein.

Respectfully submitted,

E.F. JOHNSON COMPANY

By: 

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